IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 173

UNITED STATES OF AMERICA ex Rel. MORRIS L. MARCUS and MORRIS L. MARCUS in His Own Behalf,
Petitioner,

vs.

WILLIAM F. HESS ET AL.,
Respondents.

PETITION FOR REHEARING

DONALD R. RICHBERG,
WILLIAM H. ECKERT,
EUGENE B. STRASSBURGER,
JOHN B. NICKLAS, JR.,
Attorneys for Respondents.

DAVIES, RICHBERG, BEEBE,
BUSICK & RICHARDSON,
Of Counsel.

Printed by NATIONAL PUBLISHING CO., 1220 H St., N. W., Washington, D. C.

SUBJECT INDEX

TABLE OF CITATIONS

Statutes

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 173

UNITED STATES OF AMERICA ex Rel. MORRIS L. MARCUS and MORRIS L. MARCUS in His Own Behalf,

Petitioner,

vs.

WILLIAM F. HESS ET AL.,

Respondents.

PETITION FOR REHEARING

To the Honorable, the Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Brief Statement of Grounds for This Petition.

This petition is not a futile effort to induce the Court to change its opinion and construction of the statutes here involved.

But we would respectfully submit that the Court, in its preoccupation with major issues, naturally gave *no consideration* to the serious errors committed in the *trial* of this case. The Circuit Court of Appeals ex-

pressly found it "unnecessary to pass on" these issues because of its ruling that the present informer suit was not authorized by the federal statutes.

This Court has reversed the holding of the Circuit Court of Appeals and held the suit to be authorized, whereupon it might have been expected that the Court would remand the case to the Circuit Court of Appeals for a necessary review of errors assigned by respondents in their appeal from the adverse judgment of the trial court.

> "As the view of the Circuit Court of Appeals that the receiver was without authority to bring the action against Leach & Company was erroneous, its judgment must be reversed. And since it did not determine the merits of the receiver's claim, the case will be remanded to that court with instructions to proceed to that end in conformity with this opinion." *Grant v. Leach & Co.*, 280 U. S. 351, 363.

Of course this Court *could* undertake to review the assignments of error made on appeal from the District Court, but not considered by the Circuit Court of Appeals. But it is apparent (as we shall hereafter demonstrate) that the Court did not follow this alternative practice, but actually affirmed the judgment of the District Court upon the mistaken impression either that no substantial errors had been assigned or that the Circuit Court of Appeals had already ruled against the contentions of respondents.

Under these circumstances, respondents seek, by this petition, relief to which they are clearly entitled in the form of either (1) the grant of a rehearing so that the Court may give full and fair consideration to assignments of gross errors in the trial of this case; or (2) a modification of the order of the Court so that the case may be remanded to the Circuit Court of Appeals with

instructions to proceed in conformity with the opinion of the Court.

TWO MAJOR ERRORS NOT YET REVIEWED BY ANY COURT

I. The Measure of Damages.

The entire amount of damages found in the verdict of the jury—$203,000—could only have been reached by the jury following a rule of damages laid down in the charge of the trial court which seems, at first, plausible but which, on examination, becomes so absurd that it could never be approved by this Court after any careful consideration.

The statute required the jury to ascertain the amount of damages which the United States may have sustained by virtue of collusive, fraudulent bidding on electrical work.

(Counsel make no effort to excuse or palliate the wrongdoing of respondents, but do insist that they should be penalized in accordance with the law and not by any indefensible misapplication of the law.)

In order to estimate the damages sustained by the United States, it must be first determined that a fraudulent increase in the cost of electrical work operated to increase the payments made by the United States. It must be understood at the outset that the P. W. A. grant from the United States was 45% (or, in some instances, 30%) of the *estimated cost* of the project, which was approved *before* any bids were asked or submitted from those who were to do the work. Therefore, after the United States had agreed to pay the municipality an amount specifically limited in dollars and cents (R. 163) to defray part of the cost of a public project, the United States could not be damaged to the extent of one dollar by any excessive charge for work unless that excessive charge *prevented a diminution* of the pay-

ment which the United States had promised to make. No excessive bid could *increase* the United States' payment.

Possibly the court below, or this Court, may have been misled into thinking that the United States agreed to pay 45% of the final cost of a project, not understanding that, in fact, the United States agreed to pay a specific amount which, under the law, could not exceed 45% of the *pre-determined* cost of the project. Or this Court may have thought that the estimated cost of the project approved by the United States was based on bids or estimates submitted by the defendants.[1] This is not the fact.

Now it may or may not have been a fact that in some of the projects involved in this case the total cost was less than the estimated cost, and as a result the United States' payment would be reduced from the maximum amount of the approved grant to the amount of 45% of actual cost. In *such* a case, if the actual cost were increased above a reasonable amount because of fraudulent or collusive bidding, then the United States would be damaged to the extent of 45% of the excessive charge. Likewise, if, because of an excessive charge, the United States were compelled to pay the full amount of the grant instead of a somewhat smaller amount, damage would be sustained.

The foregoing statements, which are hardly debatable, should make it clear that a necessary element of proof of damages would be evidence of the estimated and actual cost of the projects—then evidence of the

[1] The statement is mistakenly made in the opinion of this court that the taint of fraud "entered into every swollen estimate which was the basic cause of every dollar paid by the P. W. A. into the joint fund for the benefit of respondents". As a matter of fact *no* "swollen estimate" made by a respondent was the basis of any P. W. A. grant; and the record proves that the *bids* of respondents, which were *made after* the P. W. A. grant was made, did not affect or cause the payment of a single additional dollar by P. W. A. in aid of at least some of these projects . . . as will be demonstrated hereafter.

electrical bid and the reasonable cost of the electrical work, then a computation to determine to what extent, *if any*, the alleged excessive cost resulted in a payment by the United States larger than the United States' payment if the electrical bid had equalled the reasonable cost.

The informer-plaintiff was not required by the ruling of the trial court to present such essential evidence, nor did he present it. On the contrary, the plaintiff's faulty and misleading computation of damages was not only presented in evidence, but the court allowed it to be taken by the jury as a correct calculation based on the plaintiff's evidence, which the court sustained as proper and adequate. (R. 142, 146) Also, the court refused to instruct the jury to the effect that, in any case where the United States would have paid the maximum amount of its grant even if there had been no excessive charge for electrical work, the United States sustained no damage. (R. 335) The following tabulations, based on the plaintiff's own evidence, show the utter inaccuracy of the plaintiff's computation of damages and the serious error of the trial court in approving plaintiff's method of computing damages:

MILLER SCHOOL

Electrical Contract Actual Cost			$24,152.00
Informer's Estimate of "Fair" Cost			14,023.10
Alleged Excessive Cost			$10,128.90
Total Actual Cost	$289,879.69		
Deduct Excessive Cost	10,128.90		
Total Reasonable Cost	$279,750.79		
Original Estimated Cost	$225,647.00		
PWA Grant (45%) *Maximum*	101,541.00	—Payable even if there had been no excessive charge for electrical work.	

But informer claimed and was allowed damages of $4,558.00.

CRESCENT SCHOOL

Electrical Contract Actual Cost	$34,940.00
Informer's Estimate of "Fair" Cost	20,342.73
Alleged Excessive Cost	$14,597.27

Total Actual Cost	$600,281.20	
Deduct Excessive Cost	14,597.27	
Total Reasonable Cost	$585,683.93	
Original Estimated Cost	$543,860.00	
PWA Grant (45%) *Maximum*	244,737.00	—Payable even if there had been no excessive charge for electrical work.

But informer claimed and was allowed damages of $6,568.77.

SNOWDEN TOWNSHIP SCHOOL

Electrical Contract Actual Cost		$4,200.00
Informer's Estimate of "Fair" Cost		3,539.68
Alleged Excessive Cost		$660.32
Total Actual Cost	$62,633.15	
Deduct Excessive Cost	660.32	
Total Reasonable Cost	$61,972.83	
Original Estimated Cost	$52,727.00	
PWA Grant (45%) *Maximum*	23,727.00	—Payable even if there had been no excessive charge for electrical work.

But informer claimed and was allowed damages of $297.14.

In the Miller, Crescent and Snowden Projects alone —informer claimed and was allowed double damages totalling $22,847.82 which could not possibly have been authorized by the statute.

The plaintiff-informer failed to produce evidence, except as to the foregoing three projects, from which it could be determined how many other projects likewise involved *no possible loss* to the United States because of excessive costs of electrical work. Since the burden of proof was on the plaintiff it is thus apparent that the plaintiff did not prove that *any* damages had been sustained. He merely submitted evidence that damages *might* have been sustained. It is elementary that such proof is insufficient. (*Keogh vs. C. & N. W. Ry. Co.*, 260 U. S. 156, 165.)

The trial judge said: "We cannot follow this argument". (R. 370) This, we submit, is no answer to the invocation of a rule of evidence which should be under-

stood and correctly applied by a first year law student. Certainly the Supreme Court will not countenance such an utter disregard of well settled law.

Now it might appear that the Supreme Court gave consideration to this assignment of error because the issue was presented and briefly discussed in respondents' brief in the Supreme Court. But it is evident that the Court either gave this error no consideration or was misled by inexcusable misstatements in petitioner's reply brief for the following reasons:

1. The plaintiff's method of computing damages is indefensible when the facts are understood..

2. The plaintiff-petitioner did not file his reply brief, and respondents did not receive a copy, until about an hour before the case was called for argument. In that reply brief (p. 24), counsel for petitioner made the following false statement: "Indeed respondents later in their argument admit that the rule applied is proper saying 'We have raised no question about that being the proper measure of damages' ". Reference is then made to respondents' brief, page 109, where respondents simply said that the proper measure of damages would be "the money which the government contributed to each project in excess of what it would have paid had there been fair and open competition".

Counsel for petitioner, in the reply brief, further said (p. 25): "Neither of the courts below accepted respondents' argument and the Circuit Court of Appeals very properly held that by respondents' acts 'the government was defrauded in that it was compelled to contribute more for the electric work * * * than it would have been required to pay had there been free competition in the open market' ". This statement was inexcusably misleading. First, the trial court did not accept respondents' argument on this point; and refused to make the charge requested. Second, the Circuit Court of Ap-

peals never passed on *this* issue as to the proper *evidence* for measuring the damages but, unfortunately, made the general statement quoted, without passing on the question of what *evidence* would be necessary to show in a particular case that the United States sustained damages because more had been paid for electric work than if there had been free competition in the open market.

3. The Supreme Court was evidently deceived by the misleading statements of petitioner's counsel because, in the next to the last sentence of the opinion, the Court said: "We have examined the other contentions of the respondents and approve of the disposition of them by the courts below". None of these contentions of respondents was even considered by the Circuit Court of Appeals, and, because of this misunderstanding, they were evidently not given adequate consideration, if any, by the Supreme Court.

4. Finally, upon the oral argument, counsel for respondents, realized, on a hasty reading of the reply brief, that attention should be called to its misstatements, and started to argue the errors of the trial court as well as the single issue decided by the Circuit Court of Appeals. *But they were deterred by the Chief Justice who stated that in the event of a reversal the practice would be to remand the case for further action by the Circuit Court of Appeals.*

Counsel realize, upon a study of the precedents, that this Court might properly either remand the case or, upon a full consideration of the record, proceed to a complete decision. But if the Court should prefer, in this case, not to remand but to make a complete decision, we earnestly submit that a rehearing should be granted in order that the really important issues raised by assignments of error in the Circuit Court

of Appeals should be given full consideration. We point out that by its opinion, which permits an informer to start a private suit for damages against any person indicted by the United States with no more effort than to copy the indictment, the inevitable consequence will be a mass of such suits. The proper rule for measuring damages, and the proper evidence of damages in such suits thus becomes a matter of far-reaching interest. The assignment of error we have just discussed and the ones to be discussed hereafter raise issues which will not be settled without authoritative rulings from this Court. We submit that such issues should not be apparently decided by this Court without full and adequate consideration.

II. Evidence of Damages.

The evidence of damages upon which plaintiff relied consisted of the testimony of one "expert witness".

Evidence of this character may be regarded as proper and, in some instances, perhaps the only available evidence. But it should be plain that the testimony of an expert witness upon the very vital matter of damages, when the plaintiff has a personal interest in getting one-half of the damages (although he has suffered no damage) should be scrutinized most carefully, and subject to check by any relevant evidence available. In the present instance, the defendants sought in vain to introduce evidence of the actual costs of doing the electrical work in question. Clearly, electrical contractors, seeking, naturally, to make a profit, are going to hold down their costs as far as possible. They are going to pay for material and labor no more than they are compelled to pay. The best possible check upon the reasonableness of any estimate is a hindsight record of actual costs.

Fraudulent, collusive bidding is a wrong, subject to punishment, but the question as to whether damages resulted is an entirely different question. A group of contractors may seek to divide up work so as to avoid what is sometimes called "destructive competition". They may not be seeking an unfair profit but only assurance of a reasonable profit. Such motive and intention would not absolve them from guilt in the violation of statutory requirements of free competition. But the question in a damage suit is: How far have these wrongful acts actually injured another party?

When estimates are made as the basis for competitive bids, the bidders obviously start with an effort to estimate their actual costs. They will then increase their cost estimate with a margin to cover profit and possible risk of loss. But if, by some method, it were possible, in advance, to estimate with perfect accuracy actual costs, that would provide the foundation for each and every bid.

So, when the question is presented to a court to determine the reasonable cost of work in a free, competitive market, it would seem that the record of actual costs which is available when a job is completed would provide, not only the proper foundation for any estimate of reasonable cost, but also a proper check upon any estimates made on any other basis. The defendants in the present case were denied the right to produce such evidence, which would certainly have shed a clear light upon the reasonableness of the estimates of the solitary "expert witness" for the self-interested plaintiff.

In addition to the offer of defendants to prove actual costs, they offered evidence that such actual costs were fair and reasonable and the lowest prices at which the work could be done in accordance with the respective

contracts. All this evidence was excluded. (R. 122, 123) Not a single authority was cited by the District Court or by learned counsel for the plaintiff for excluding such evidence, whereas, on the other hand, a large number of authorities have been cited by the defendants, the present respondents, among which we may call attention to the following:

Prudence Company v. Fidelity & Deposit Co., 297 U. S. 198;

The Albert Dumois, 177 U. S. 240, 255;

22 C. J., 184, 185.

Under the last citation, many cases are noted to the effect, first, that, while price paid does not by itself furnish a satisfactory test of value, it is a circumstance to be weighed in connection with other evidence; and, second, that evidence of what an article sold for in a bona fide transaction is relevant to prove value and, indeed, may provide the best evidence of value.

Applying this principle to the present case, we submit that the amounts which the defendants paid for labor (in accordance with standard union scales) and the amounts paid for material purchased in the open market, provide the very best evidence of the reasonable cost of the electrical work under consideration. Just because the defendants conspired to eliminate competition between themselves in getting electrical work carries with it no inference that they would be able to get labor (in a strongly unionized field), or to get material from independent manufacturers, at anything different from regular prevailing prices, nor is any such claim made against them.

Furthermore, they had every interest to keep down their costs, and the obvious purpose of conspiring to eliminate competition would be to gain a satisfactory

(perhaps an unreasonable) profit, which would require keeping costs as low as possible. Therefore, the costs actually paid, although not conclusive as to reasonable cost or value of the work, are evidence too plainly material and relevant to be excluded, particularly when defendants offered at the same time to produce further evidence (which was also excluded) that such actual costs were reasonable.

In addition, the plaintiffs relied on that most unreliable of all testimony—the opinion evidence of a so-called expert witness. The law does not look with favor on opinion evidence (22 C. J., 498) and testimony of this character should certainly be subjected to every possible test in order that the jury may correctly appraise its value. Particularly, there should be every check upon the opinion evidence of an expert witness testifying in behalf of an informer plaintiff who has the strongest possible incentive to exaggerate any just claim.

Again, let it be pointed out that the issue in this case was not the common issue of the "value" of property (where original cost may or may not be the best evidence, as has been debated so extensively in public utility rate regulation cases). But the object of the evidence was to show what the government would have paid if there had been fair competition among bidders. Thus, the reasonable cost of doing this exact work *at this time* was the object of inquiry. Since defendants had no possible reason for trying to increase their out-of-pocket costs, the evidence of what they actually paid for labor and materials provides the best evidence of reasonable cost. It would only be necessary to add to this actual cost of labor and material, opinion evidence as to a reasonable profit in order to show most precisely what the government would have had to pay if there had been competitive bidding.

Many of the cases cited by the appellants-defendants in the Circuit Court of Appeals, to sustain their proffered evidence, were contract cases, but they are thoroughly applicable because "the underlying principles governing an award of damages are the same whether the action is in contract or in tort and do not depend upon its form". (17 C. J. 717, 752; *Hetzel v. B. & O. R. Co.*, 169 U. S. 26, 38)

There is a close parallel between the proper measure of damages in this case and that which was approved in *Straus v. Victor Talking Machine Co.*, 297 Fed. 791, a case cited with approval by the Supreme Court in the recent case, *Story Parchment Co. v. Paterson Company*, 282 U. S. 555.

The Circuit Court of Appeals, in the Straus case, approved the evidence of damages which were claimed in a treble damage suit under the provisions of the anti-trust laws. The plaintiffs, as retailers, sued for loss of profits resulting because the Victor Company refused to allow its distributors to sell to the plaintiffs at the customary dealer's discounts. In the language of the court (page 802), the position of the plaintiffs was "that they were entitled to buy goods in a free market; that they were prevented from doing this by defendants' illegal combination; that they were forced, therefore, to buy in the market which defendants had created, and were thus compelled to pay more for their goods than the price which in that market was the fair and reasonable price established by defendants themselves". The plaintiffs proved their case and were given damages based on evidence of the prices "established by the defendants themselves", which were accepted as fair and reasonable prices.

The issue in the Straus case was essentially the same as in the present case, i. e., what damage was caused because, by virtue of an illegal conspiracy, the plaintiffs were compelled to pay more than a reasonable price.

The actual prices *charged by the defendants* were held proper evidence of fair and reasonable prices. In the present case, we are only contending that the actual prices *paid* by the defendants to third parties were proper evidence in computing the reasonable cost of work done by the defendants. We submit that the reasoning in the Straus case is pertinent and sound.

A recent case decided by the United States Court of Appeals for the District of Columbia is also in point. In *Nunan v. Timberlake*, 85 F. (2d) 407, the court held that in a suit for damages plaintiff could make a prima facie case by proving the amount of bills paid or incurred for professional services, even without supplemental testimony as to the reasonable value of the services. The court also allowed evidence of the original cost of damaged apparel, supplemented by testimony as to the age of the articles and the nature of the injury to them.

We suggest that if an informer-plaintiff had access to defendants' actual costs and sought to introduce such evidence in order to prove *exorbitant* profits and, thereby, establish damages, a court would hardly think of excluding such evidence. When it happens that such evidence is sufficiently favorable so that defendants themselves desire to introduce it, supported by testimony as to the reasonableness of out-of-pocket costs, the evidence should not be excluded.

In conclusion, on this point, we submit that in view of the large number of cases which may be, and already have been, brought by an informer or by the government to recover damages for alleged frauds of the character here involved a ruling on this point is most important. There should be no question of the right of defendants to introduce evidence of actual costs and evidence of their reasonableness, as a necessary check upon exaggerated estimates of damages produced by

interested "expert" witnesses. Otherwise, it might appear, from the present opinion of the Court, that the exclusion of highly relevant material evidence of actual costs had been sanctioned by this high tribunal.

TWO FURTHER ERRORS OF TRIAL COURT WHICH SHOULD BE CORRECTED

III. Multiplying the Statutory Forfeit.

The statute under which this suit was brought provides explicitly for the payment of a forfeit in the sum of $2,000 "and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing of such act". The District Court held that the $2,000 forfeit could be assessed for each project, and the Supreme Court, in its opinion, specifically approves this ruling.

We think the Court has overlooked the fact that the crime for which the defendants were required to respond in damages was a conspiracy to defraud the government, and *that* was the *act* which gave rise to a liability to forfeit $2,000 and to pay, in addition, double the amount of damages sustained. The opinion points out that the liability upon each conspirator arose "without regard to whether that person had direct contractual relations with the government". It is entirely clear that no contractor presented any claim for payment or made any false claims (applying the law as it has been construed by the Supreme Court) except in connection with a project wherein *that contractor* did the work.

If the jury had been asked to separate the wrongdoing of each contractor and to hold him responsible for damages and a forfeiture because of his acts in connection with a single project, an entirely different verdict would have been sought and rendered. On the contrary, the District Court expressly stated in its opinion: "This

is a conspiracy case where the rule applies that each contractor is liable for all the acts of his co-conspirators done in pursuance of the conspiracy". (R. 375) The District Court charged the jury elaborately as to the law of conspiracy and held that "the plaintiffs in this case have the burden of showing by the fair weight of testimony that the defendants were engaged in a conspiracy to defraud the United States". (R. 139) The District Court submitted several forms of a verdict to the jury, and made this statement: "If you find a verdict against all of the defendants, you need not mention them by name but it would be sufficient for you merely to say 'We find a verdict for the sum of (blank) dollars against all the defendants' ". (R. 146)

Nevertheless, the court then held that if the jury found that a conspiracy existed, the penalty of $2,000 should be assessed for each project in which there had been collusive bidding, not only the forty-eight in which inadequate evidence had been offered to show actual damage suffered by the United States, but also eight others in which there was no evidence of actual damage suffered. The jury found a verdict in one lump "sum of $315,100.91, being $203,100.91 damages and $112,000 penalty". (R. 338)

If the jury had found a wrongful act in connection with each project, it would have been necessary, in accordance with the statute, to return a verdict for a $2,000 forfeiture and, in addition, the damage in connection with that project; instead of which, the jury followed the ruling of the court in assessing the *damages* for *one* wrongful act (R. 381) (the conspiracy, which the court described in its opinion as the "collusive bidding plan") (R. 375) and then proceeded, in accordance with the erroneous instruction of the court, to assess a *penalty* for each project (56 in all), although it had not found the defendants or any of them sepa-

rately guilty of a wrongful act in connection with a particular project.

The action of the jury is made plain in the verdict first brought in which read as follows: (R. 370)

> "And now, to wit March 22, 1941, we, the Jurors empaneled in the above-entitled case, find the defendants guilty as charged in the indictment and award damages in the sum of Two hundred three Thousand one thousand *(sic)* dollars and ninety one cents (203,100.91) plus the penalty of One hundred twelve thousand dollars Total $315100 91/100—The jury absolves Mr Robt C Carmack from damages in this suit
>
> "Walter S. Colmery—Foreman"

We submit that a conspiracy should not be arbitrarily divided into a series of wrongful acts. Upon that theory, it would be often possible, first, to divide a conspiracy into innumerable wrongful acts and then to divide the *results* of the conspiracy into a series of innumerable wrongful acts. Indeed, the ingenious counsel for plaintiffs contended that each affidavit or certificate on which payments were made created a liability for the $2,000 penalty.

We submit that an earlier opinion of this Court written by Mr. Justice Holmes accurately describes a conspiracy in restraint of trade (which is the real conspiracy here involved) as a continuing and single offense. The learned Justice makes the following pertinent observations:

> "But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, and there is such continuous cooperation, it is a perversion of natural thought and of natural language to call such continuous cooperation a cinematographic series of distinct con-

spiracies, rather than to call it a single one. Take the present case. A conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contemplates that the conspirators will remain in business and will continue their combined efforts to drive the competitor out until they succeed. If they do continue such efforts in pursuance of the plan the conspiracy continues up to the time of abandonment or success. * * *" *U. S. vs. Kissel*, 218 U. S. 601, 607.

There is a clear distinction between a prosecution for the theft of mail from separate bags in a post office and the present suit to recover the penalty here involved in Section 3490. The statute involved in the mail bag case was intended, as the court held *(Ebeling v. Morgan*, 237 U. S. 625, 629) "to protect each and every mail bag from felonious injury and mutilation". The statute under present consideration provides specifically for a single forfeit of $2,000 and "in addition" double damages—"such forfeiture and damages shall be sued for in the same suit". Whatever acts prohibited by Section 5438 have been committed, the suit is intended to cover all damages and a single forfeiture. This is emphasized by the provision of Section 3492 to the effect that a person accused may be arrested and held to bail "not exceeding the sum of $2,000 and twice the amount of the damages sworn to in the affidavit of the person bringing the suit". Clearly, the lawmakers did not contemplate a recovery greater than $2,000 plus double damages.

If the informer had undertaken the more difficult task of suing separately the defendants, holding each responsible only for the damages caused by any false claims he might have made, then the utmost verdict against each defendant would have been a forfeiture of $2,000 plus a limited amount of double damages. But the informer made the choice of suing all defendants

jointly for the single, continuing offense of conspiring to defraud the government, thereby making it possible to impose joint and several liability for the total damages. Having obtained this benefit of proceeding on the basis of a single, common offense, he then sought to have the offense divided into a series of offenses so numerous that the District Court would not follow him that far. But the court did allow the assessment of a penalty fifty-six times the amount fixed in the statute by assessing the penalty separately as to each project, as though fifty-six suits had been brought, charging fifty-six separate liabilities. Whereas, in fact, in conformity with the statute, there is only one suit with a single liability for one forfeiture and for the total double damages: "Such forfeiture and damages shall be sued for in the same suit". (Rev. Stat. Sec. 3490)

It is suggested in the opinion of the Supreme Court that the Congress did not mean to reduce the damages recoverable for respondents' fraud and thereby allow them to spread the burden progressively thinner over projects, each of which individually increased their profit. The fact is that by suing the defendants jointly for a conspiracy and thereby making it possible to increase the damages recoverable from any one defendant, the burden, instead of being spread thinner, has been spread so thickly that no one can tell how heavy it may be upon those who are eventually compelled to pay. We submit that since the defendants were tried and convicted for conspiracy, the penalty provided in the statute could only be assessed once.

IV. The Nolo Contendere Plea.

There was one further violation of the rights of respondents which this court would certainly not wish to approve even *sub silentio.*

The first objective of the trial was to determine

whether the defendants were guilty of a crime as the basis for a civil liability. They were entitled to the verdict of an unprejudiced jury. The law is well settled that their previous pleas of *nolo contendere* could not be used as an admission of civil liability. *(Tucker v. U. S.*, 196 Fed 260, 262) Nevertheless, counsel for the informer-plaintiff persisted in arguing to the jury that the defendants had admitted their guilt by pleading *nolo contendere* and offering no defense to criminal charges. The very gentle rebuke of the court (R. 127-129) did not at all cure the harm done and the court denied defendants' motion for the withdrawal of a juror.

The excuse was offered that counsel for defendants had referred themselves to the plea of *nolo contendere.* The fact was that counsel for defendants had sought to prove by the testimony of the government prosecutor in the criminal case that the plea of *nolo contendere* had been made as the result of an agreement with the government that whatever punishment the court imposed on the conspiracy indictment would be in satisfaction of all criminal liability of the defendants on indictments for the alleged conspiracy, for false certificates and for affidavits of non-collusion, which were the subject of additional indictments. Counsel for defendants sought to offer this testimony in support of their plea of double jeopardy. When the court declined to permit the testimony of the Special Assistant to the Attorney General and overruled the plea of double jeopardy, there was no further basis for adverting to the plea of *nolo contendere*, except the improper purpose of persuading the jury that they should find defendants guilty on the ground that defendants had already admitted their guilt. To allow counsel for the informer-plaintiff, under the circumstances, not only to refer to the plea but also to argue to the jury hypocritically that, although it "cannot be used as evidence

of guilt in this particular case", these defendants had pleaded *nolo contendere* to the same charges when made in the criminal court, was a gross violation of the rights of the defendants. It amounted to assuring the jury that there was no question of the guilt of the defendants—that they had admitted defrauding the government in every project under consideration (which was not true)—and that therefore all that was left was for the jury to assess the amount of damages.

Even though this present prosecution may be described as a civil action, it was an action requiring the jury to find, as a basis for liability, that the defendants were guilty of a crime, or a series of crimes. Defendants were certainly entitled to have that issue submitted to the jury without the improper contention that they had already confessed their guilt. On this point, we also submit that the silent sanction of the Supreme Court should not be given to such a flagrant violation of the rights of defendants.

Conclusion.

For the reasons heretofore given, we submit that either a rehearing should be granted, in order that this Court may give full consideration to the serious errors of the trial court not heretofore reviewed by any court, or that the order of the Court should remand the case to the Circuit Court of Appeals for action there in conformity with the opinion of this Court.

Respectfully submitted,
DONALD R. RICHBERG,
WILLIAM H. ECKERT,
EUGENE B. STRASSBURGER,
JOHN B. NICKLAS, JR.,
Attorneys for Respondents.

Davies, Richberg, Beebe,
Busick & Richardson,
Of Counsel.

CERTIFICATE OF COUNSEL.

We, Donald R. Richberg, William H. Eckert, Eugene B. Strassburger and John B. Nicklas, Jr., attorneys for respondents, William F. Hess et al., do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

Dated, Washington, D. C.
February 11, 1943.

DONALD R. RICHBERG,
WILLIAM H. ECKERT,
EUGENE B. STRASSBURGER,
JOHN B. NICKLAS, JR.,
Attorneys for Respondents.

pp. 6, 11, 14, 15 of Frankfurter J.

SUPREME COURT OF THE UNITED STATES.

No. 173.—October Term, 1942.

United States of America *ex rel.* Morris L. Marcus and Morris L. Marcus in His Own Behalf, Petitioner, *vs.* William F. Hess et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January 18, 1943.]

Mr. Justice Black delivered the opinion of the Court.

Respondents, electrical contractors, were employed to work on P. W. A. projects in the Pittsburgh area. Their contracts were made with local governmental units rather than with the United States government, but a substantial portion of their pay came from the United States. Charging the respondents with defrauding the United States through the device of collusive bidding on these projects,[1] the petitioner, in the name of the United States and on his own behalf brought this action under § 5438 and §§ 3490-3493 (31 U. S. C. §§ 231-234) of the Revised Statutes.

These sections, now distributed through the statutes, are parts of what was originally the Act of March 2, 1863, 12 Stat. 696. Section 5438 contains that portion of the original Act which makes certain efforts to defraud the government a crime punishable by fine and imprisonment.[2] Section 3490 separately provides that

[1] The nature of the collusive bidding scheme was described by the court below as follows: "The appellants, the officers and members of the Electrical Contractors Association of Pittsburgh, conspired to rig the bidding on these projects. The pattern of the collusion was the informal and private averaging of the prospective bid which might have been submitted by each appellant. An appellant chosen by the others would then submit a bid for the averaged amount and the others all submitted higher estimates. The government was thereby defrauded in that it was compelled to contribute more for the electric work on the projects than it would have been required to pay had there been free competition in the open market." 127 F. 2d 233, 234.

[2] Section 5438 includes three categories of acts subject to the penalty which it prescribes. The first of these clauses, which in our opinion governs the instant case, covers "Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military or naval service of the United States, any claim upon or

whoever commits "any" of the prohibited acts shall "forfeit and pay to the United States the sum of two thousand dollars, and in addition, double the amount of damages . . . sustained . . . together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit." Under §§ 3491, 3493, this latter action may be instituted by "any" person in behalf of the government, and where such a qui tam action is brought, half the amount of the recovery is paid to the person instituting the suit while the other half goes to the government.

In the instant case verdict and judgment for $315,000 were rendered against the defendants, of which $203,000 was for double damages and $112,000 was an aggregate of $2,000 sums for 56 violations of § 5438. 41 F. Supp. 197. The Circuit Court of Appeals was of the opinion that the government had been defrauded—a conclusion not challenged here[3]—but held that the particular fraud was not reached by § 5438. It accordingly reversed. 127 F. 2d 233.

First. The Court below, construing § 5438 with "utmost strictness" on the premise that qui tam or informer actions "have always been regarded with disfavor" by the courts, emphasized the absence of a direct contractual relationship between the respondents and the United States, and held that "The claims of the defendants then were simply against the local municipalities. Since the defendants had no claim upon or against the United States, this action was not authorized by the informer statutes."

We can not accept either the interpretive approach or the actual decision of the court below. Qui tam suits have been frequently permitted by legislative action,[4] and have not been without de-

---

against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent . . ." The second clause governs the use of false certificates, etc., for the purpose of obtaining or aiding to obtain payment of such a claim, and the third covers conspiracy to defraud the government by obtaining or aiding to obtain the payment of a claim. This section, with amendments not relevant to actions under § 3490, now appears as 18 U. S. C. §§ 80, 83.

[3] Cf. McMullen v. Hoffman, 174 U. S. 639, 649. For the general federal competitive bidding statute see 41 U. S. C. § 5.

[4] "Statutes providing for actions by a common informer, who himself has no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government," Marvin v. Trout, 199 U. S. 212, 225. Some such statutes are 18 U. S. C. § 23 (arming vessels against friendly powers); 31 U. S. C. §§ 155, 163 (breaches of duty by the Treasurer or the Register of the United States); 25 U. S. C. §§ 193, 201 (protection of Indians); and see footnote 9, *infra*. For a statute dealing with the allocation of costs in penal actions brought by an informer, see 28 U. S. C. § 823. Statutes

fense by the courts.[5] Moreover, this interpretation of "utmost strictness" narrows not only the qui tam aspect of the Act, but also the criminal provisions. The decision below treats the language of § 5438 in such fashion that no criminal proceedings could be brought against the respondents, a result to which the policy on qui tam actions is immaterial even if it exists or could properly be applied. This "qui tam policy" cannot be used to detract from the meaning of the language in the criminal section; and we cannot say that the same substantive language has one meaning if criminal prosecutions are brought by public officials and quite a different meaning where the same language is invoked by an informer.

Congress has power to choose this method to protect the government from burdens fraudulently imposed upon it; to nullify the criminal statute because of dislike of the independent informer sections would be to exercise a veto power which is not ours. Sound rules of statutory interpretation exist to discover and not to direct the Congressional will. True, § 5438 is criminal and for that reason in interpreting so much of its language as it shares in common with Sec. 3490 we must give it careful scrutiny lest those be brought within its reach who are not clearly included; but after such scrutiny we must give it the fair meaning of its intendment. Cf. *U. S.* v. *Raynor*, 302 U. S. 540, 552.

We think the conduct of these respondents comes well within the prohibition of the statute which includes "every person who . . . causes to be presented, for payment . . . any claim upon or against the Government of the United States . . . knowing such claim to be . . . fraudulent." This can best be seen upon consideration of the exact nature of respondents' relation to the government. The contracts found to have been induced by

providing for a reward to informers which do not specifically either authorize or forbid the informer to institute the action are construed to authorize him to sue, Adams v. Woods, 2 Cranch 336.

[5] In support of the view of the court below, see Taft v. Stevens Lith. and Eng. Co., 38 F. 28; but cf. United States v. Griswold 24 F. 2d 361, 366, in which the Court speaking of this section says: "The statute is a remedial one. It is intended to protect the Treasury against the hungry and unscrupulous host that encompasses it on every side, and should be construed accordingly. It was passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel."

the respondents' frauds were made between them and local municipalities and school districts of Alleghany County, Pennsylvania. A large portion of the money paid the respondents under these contracts was federal in origin, granted by the Federal Public Works Administrator, an official of the United States. 40 U. S. C. 401(a). The jury and both courts have found that the contracts were obtained by a successfully executed conspiracy to remove all possible competition from "competitive bidding." The bidding itself was a federal requirement; all bidders were fully advised that these were P. W. A. projects; and many if not most of the respondents certified that their bids were "genuine and not sham or collusive." While payment itself, in the sense of the direct transferring of checks, was done in the name of local authorities, monthly estimates for payment were submitted by the respondents to the local sponsors on P. W. A. forms which showed the government's participation in the work and called attention to other federal statutes prohibiting fraudulent claims. It was a prerequisite to respondents' payment by the local sponsors that these estimates be filed, transmitted to, and approved by, the P. W. A. authorities. Payment was then made from a joint construction bank account containing both federal and local funds. The work was done under constant federal supervision.

The government's money would never have been placed in the joint fund for payment to respondents had its agents known the bids were collusive. By their conduct, the respondents thus caused the government to pay claims of the local sponsors in order that they might in turn pay respondents under contracts found to have been executed as the result of the fraudulent bidding. This fraud did not spend itself with the execution of the contract. Its taint entered into every swollen estimate which was the basic cause for payment of every dollar paid by the P. W. A. into the joint fund for the benefit of respondents. The initial fraudulent action and every step thereafter taken pressed ever to the ultimate goal—payment of government money to persons who had caused it to be defrauded.

Government money is as truly expended whether by checks drawn directly against the Treasury to the ultimate recipient or by grants in aid to states. While at the time of the passage of the original 1863 Act, federal aid to states consisted primarily of land grants, in subsequent years the state aid program has grown so that in 1941 approximately 10% of all federal money was dis-

tributed in this form.[6] These funds are as much in need of protection from fraudulent claims as any other federal money,[7] and the statute does not make the extent of their safeguard dependent upon the bookkeeping devices used for their distribution. The Senatorial sponsor of this bill broadly asserted that its object was to provide protection against those who would "cheat the United States."[8] The fraud here could not have been any more of an effort to cheat the United States if there had been no state intermediary.

The conclusion that the first clause of § 5438 includes this form of "causing to be presented" a "claim upon or against the government" is strengthened by consideration of the other clauses of the statute. Clause 2 includes those who do the forbidden acts for the purpose of "aiding to obtain" payment of fraudulent claims; Clause 3 covers "any agreement, combination or conspiracy" to defraud the government by "obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim." These provisions, considered together, indicate a purpose to reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government.

The situation here is in no sense like that discussed in *United States* v. *Cohn*, 270 U. S. 339, 345-347, where the government acted solely as bailee and no person had any claim against it for a payment. The Court in the *Cohn* case held that there had been no "wrongful obtaining of money . . . of the government's", while there has been such a "wrongful obtaining" here on claims which were presented either directly or indirectly to the government with full knowledge by the claimants of their fraudulent basis.

We conclude that these acts are covered by the statute under consideration.

Second. Previous to the filing of this action these respondents were indicted for defrauding the government and on a plea of nolo contendere were fined $54,000. They, and the government which

[6] Key, The Administration of Federal Grants to States, Introduction; Bureau of the Census State and Local Government Special Study No. 19, Federal and State Aid 1941, 4.

[7] See Key, *supra*, Chapter 4 "The Audit".

[8] Congressional Globe, 37th Cong., 3rd Sess., 952.

has filed a brief amicus curiae at our request, assert that the petitioner received their information not by their own investigation, but from the previous indictment; and both argue that §§ 3490-93 should not under such circumstances be construed as permitting suit by the petitioner. The petitioner denies that they relied upon the information contained in the indictment, asserts that they spent money in conducting an investigation of their own, and claim that they presented more evidence that the government had discovered.

Even if, as the government suggests, the petitioner has contributed nothing to the discovery of this crime, they have contributed much to accomplishing one of the purposes for which the Act was passed. Their suit results in a net recovery to the government of $150,000, three times as much as the fines imposed in the criminal proceedings; and this recovery was obtained at the risk of a considerable loss to the petitioner since § 3491 explicitly provides that the informer must bear the risk of having to pay the full cost of the litigation.

Neither the language of the statute nor its history lends support to the contention made by respondents and the government. "Suits may be brought and carried on by any person", says the Act, and there are no words of exception or qualification such as we are asked to find.[9] The Senate sponsor of the bill explicitly pointed out that he was not offering a plan aimed solely at rewarding the conspirator who betrays his fellows, but that even a district attorney, who would presumably gain all knowledge of a fraud from his official position, might sue as the informer:

"The bill offers, in short, a reward to the informer who comes into court and betrays his co-conspirator, if he be such; but it is not confined to that class. Even the district attorney, who is required to be vigilant in the prosecution of such cases, may be also the informer, and entitle himself to one half the forfeiture under the qui tam clause, and to one half of the double damages which may be recovered against the persons committing the act."[10]

---

[9] There is of course no reason why Congress could not, if it had chosen to do so, have provided specifically for the amount of new information which the informer must produce to be entitled to reward. Simple informers who merely give information without formally instituting actions may collect an award for aiding in the conviction of narcotic law violators "if so directed by the court." 21 U. S. C. § 183. Cf. The authority of the Secretary of Labor who is authorized to approve awards to informers in contract labor cases. 8 U. S. C. §§ 139-140. The right of action itself may be subject to control by an administrative official, as are actions under 18 U. S. C. § 642 concerning violations of shipping laws.

[10] Cong. Globe, *supra*, 955, 956.

The government presses upon us strong arguments of policy against the statutory plan, but the entire force of these considerations is directed solely at what the government thinks Congress should have done rather than at what it did. It is said that effective law enforcement requires that control of litigation be left to the Attorney General;[11] that divided control is against the public interest; that the Attorney General might believe that war interests would be injured by filing suits such as this; that permission to outsiders to sue might bring unseemly races for the opportunity of profiting from the government's investigations; and finally that conditions have changed since the Act was passed in 1863. But the trouble with these arguments is that they are addressed to the wrong forum. Conditions may have changed, but the statute has not.

Furthermore, one of the chief purposes of the Act, which was itself first passed in war time, was to stimulate action to protect the government against war frauds.[12] To that end, prosecuting attorneys were enjoined to be diligent in enforcement of the Act's provisions, and large rewards were offered to stimulate actions by private parties should the prosecuting officers be tardy in bringing the suits.

The very fact that Congress passed this statute shows that it concluded that other considerations of policy outweighed those now emphasized by the government; for most of the arguments made here militate against any informer action at all. Had the government filed a suit prior to that instituted by these petitioners, a different question would be presented. Cf. *Francis* v. *United States*, 5 Wall. 338. Under the circumstances here, we could not, without materially detracting from its clear scope, decline to recognize the petitioner's right to sue under the Act.

Third. As noted above, respondents had previously been indicted and fined for defrauding the government in connection with the

[11] This consideration is apparently directed solely at the Department of Justice's desire to control the institution of these actions rather than their settlement. Sec. 3491 provides that the informer suits "shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court *and the district attorney*, first filed in the case, setting forth their reasons for such consent." The authority thus given the district attorney is presumably aimed at prevention of fraudulent settlements.

[12] For a discussion of the situation which gave rise to the Act, see Report of the House Committee on Government Contracts, March 3, 1863; the discussion in the Senate on this bill, Cong. Globe, *supra*, 952, *et seq.*; the opinion of the court below at 235; and Randall, Civil War and Reconstruction, 419, 427, 633.

same transactions for which they are now being sued. They contend that the present action should be barred because of the "double jeopardy" provision of the Fifth Amendment which provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The previous indictment was brought under a general statute dealing with conspiracy to defraud the government, 18 U. S. C. § 88, and is clearly criminal in nature. For violation of it respondents were liable for a fine up to $10,000 or imprisonment for two years, or both. For failure to pay their fines, they could have been sentenced to prison. *Ex parte Watkins*, 7 Pet. 568. The punishment given in that action was not intended to compensate the government, in any manner, for damages it suffered as a result of successful execution of the conspiracy. Respondents' contention was overruled by the District Court and was not considered in the Court of Appeals. It is now urged upon us as an independent ground of support for the judgment reached below. Cf. *Helvering* v. *Gowran*, 302 U. S. 238, 245.

The application of the double jeopardy clause to particular cases has not been an easy task for the courts. The subject has recently been thoroughly explored in *Helvering* v. *Mitchell*, 303 U. S. 391, in which the Court analyzed the cases now pressed upon us and emphasized the line between civil, remedial actions brought primarily to protect the government from financial loss and actions intended to authorize criminal punishment to vindicate public justice. Only the latter subject the defendant to "jeopardy" within the constitutional meaning. *Ibid.*, 397, 398. We may start therefore with the language of the *Mitchell* case: "Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense. The question for decision is thus whether . . . [the statute in question] . . . imposes a criminal sanction. That question is one of statutory construction." *Ibid.*, 399. Is the action now before us, consisting of double damages and the $2,000 forfeiture, criminal or remedial?

It is enough for present purposes if we conclude that the instant proceedings are remedial and impose a civil sanction. The statutes on which this suit rests, makes elaborate provision both for a criminal punishment and a civil remedy. Violators of § 5438 may "be imprisoned at hard labor for not less than one nor more than

five years, or fined not less than one thousand nor more than five thousand dollars." We cannot say that the remedy now before us requiring payment of a lump sum and double damages will do more than afford the government complete indemnity for the injuries done it. *Helvering* v. *Mitchell, supra,* 401.

It is, of course, well accepted that for one act a person may be liable both to pay damages and to suffer a criminal penalty. Long ago, this Court said, "A man may be compelled to make reparations in damages to the injured party, and be liable also to punishment for a breach of the public peace, in consequence of the same act; and may be said, in common parlance to be twice punished for the same offense." *Moore* v. *Illinois,* 14 How. 13, 19, 20. Congress has "power to give an action for damages to an individual who suffers by breach of the law." *Chattanooga Foundry* v. *Atlanta,* 203 U. S. 390, 396, 397. And it has this same power when it, rather than some private individual, is injured by a fraud. Quite aside from its interest as preserver of the peace, the government when spending its money has the same interest in protecting itself from fraudulent practices as it has in protecting any citizen from frauds which may be practiced upon him. "The powers of the United States as a sovereign, dealing with offenders against their laws, must not be confounded with their rights as a body politic. It would present a strange anomaly, indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection." *Cotton* v. *United States,* 11 How. 229, 231.

This remedy does not lose the quality of a civil action because more than the precise amount of so-called actual damage is recovered. As to the double damage provision, it can not be said that there is any recovery in excess of actual loss for the government, since in the nature of the qui tam action the government's half of the double damages is the amount of actual damages proved. But in any case, Congress might have provided here as it did in the anti-trust laws for recovery of "threefold damages . . . sustained and the cost of suit, including a reasonable attorney's fee." 15 U. S. C. § 15.[13] Congress could remain fully in the common law tradition and still provide punitive damages. "By the common

[13] This Court in Meeker v. Lehigh Valley Railroad, 236 U. S. 412, 432-33, sustained the validity of Sections 8 and 16 of the Interstate Commerce Act which authorized payment of attorney fees to shippers injured as a result of violation of the Act by railroads.

as well as by statute law, men are often punished for aggravated misconduct or lawless acts by means of civil action and the damages inflicted by way of penalty or punishment given to the party injured." *Davis* v. *Woodworth*, 13 How. 363, 371. This Court has noted the general practice in state statutes of allowing double or treble or even quadruple damages. *Missouri Pacific Ry. Co.* v. *Humes*, 115 U. S. 512, 523. Punitive or exemplary damages have been held recoverable under a statute like this which combines provision for criminal punishment with others which afford a civil remedy to the individual injured. *O'Sullivan* v. *Felix*, 233 U. S. 318, 324, 325. The law can provide the same measure of damage for the government as it can for an individual.

It is argued that the $2,000 "forfeit and pay" provision is "criminal" rather than "civil" even if the double damage feature is not. The words "forfeit and pay" relate alike to the $2,000 sum and the double damages. The use of the word "forfeit" in conjunction with the word "pay" does not force the conclusion that the provision is criminal. No one doubts that Congress could have accomplished the same result by authorizing "double" or "quadruple" or "punitive" damages or a lump sum payment for attorney's fees, or by definition of the elements of "actual damages." Special consequence cannot be drawn from the use of the word "forfeit". While this might under other circumstances be an appropriate word to suggest a fine upon the failure to pay which an individual might be imprisoned, no such punishment is provided here upon default in payment. The words "forfeit and pay" are wholly consistent with a civil action for damages. *Atchison Railway* v. *Nichols*, 264 U. S. 348, 350-352; cf. *Hepner* v. *United States*, 213 U. S. 103, 104-111.

It is true that "Punishment, in a certain and very limited sense, may be the result of the statute before us so far as the wrong-doer is concerned," but this is not enough to label it as a criminal statute. *Brady* v. *Daly*, 175 U. S. 148, 157. We think the chief purpose of the statutes here was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole. This conclusion is consistent with a statement made immediately before final passage of the bill. A Senator discussing these sections said: "The government ought to have the privilege of coming upon him [a fraudulent contractor] or his estate and his heirs and recovering the

money of which it is defrauded."[14] The inherent difficulty of choosing a proper specific sum which would give full restitution was a problem for Congress.

Fourth. Section 3490 requires that the $2,000 forfeit be paid for doing "any" of the acts prohibited by § 5438. Before the District Court, petitioner contended that this sum should be exacted for every form submitted by respondents in the course of their enterprise, while respondent argued that there should be merely one $2,000 sum collected for all the acts done. The district court concluded that the lump sum in damages should be assessed for each separate P. W. A. project. Petitioner does not object to this decision and we conclude that under the circumstances of this case each project can properly be counted separately. The incidence of the fraud on each additional project is as clearly individualized as is the theft of mail from separate bags in a post office, *Ebeling* v. *Morgan*, 237 U. S. 625; and see *Blockburger* v. *United States*, 284 U. S. 299. Cf. *Gavieres* v. *United States*, 220 U. S. 338, 342. Under respondents' view the lump sum to be paid would be about $30.00 a project; and we cannot suppose that Congress meant thus to reduce the damages recoverable for respondents' fraud and thereby allow them to spread the burden progressively thinner over projects each of which individually increased their profit.

We have examined the other contentions of the respondents and approve of the disposition of them by the courts below. The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

It is so ordered.

Mr. Justice MURPHY took no part in the consideration or disposition of this case.

---

[14] Cong. Globe, *supra*, 958.

SUPREME COURT OF THE UNITED STATES.

No. 173.—October Term, 1942.

The United States of America *ex rel.* Morris L. Marcus, and Morris L. Marcus in his own behalf, Petitioners, *vs.* William F. Hess, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January 18, 1943.]

Mr. Justice Frankfurter, concurring.

I agree with the decision of the Court. But it seems to me that the plea of double jeopardy should be rejected on a ground other than that taken by the Court. In all other respects I join in its opinion.

This is a *qui tam* action under R. S. § 3490 to recover a "forfeiture" and "double the amount of damages which the United States may have sustained" by reason of the same acts of fraud for which the respondents were previously indicted under § 37 of the Criminal Code, 18 U. S. C. § 88, and for which substantial fines were imposed upon them. The Fifth Amendment guarantees that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb". The respondents invoke this provision as a bar to this suit; and as I understand its holding, the Court rejects this plea of double jeopardy by treating the present action as one merely to make the United States whole for actual loss, and therefore without any punitive elements. The Court reaches this conclusion by applying the distinction taken in *Helvering* v. *Mitchell*, 303 U. S. 391, 400, between "sanctions that are remedial and those that are punitive". The argument seems to run thus: Double jeopardy means attempting to punish criminally twice; this is not an attempt to punish criminally because it is a civil proceeding; it is a civil proceeding because, as a matter of "statutory construction", it is a "civil sanction" which is being enforced here; and the sanction is "civil" because it is "remedial" and not "punitive" in nature.

Such dialectical subleties may serve well enough for purposes of explaining away uncritical language in earlier cases. See, for

instance, *United States* v. *Chouteau*, 102 U. S. 603, and *Coffey* v. *United States*, 116 U. S. 436. But they are too subtle when the problem is one of safeguarding the humane interests for the protection of which the double jeopardy clause was written into the Fifth Amendment.

Punitive ends may be pursued in civil proceedings, and, conversely, the criminal process is frequently employed to attain remedial rather than punitive ends. It is for this reason that *scienter* has not been deemed to be a requirement in some criminal prosecutions. "Many instances of this are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes . . ." *United States* v. *Balint*, 258 U. S. 250, 252.

The protection against twice being punished for the same offense should hardly be made to depend upon the necessarily speculative judgment of a court whether a "forfeiture" and "double the amount of damages which the United States may have sustained" constitutes an extra penalty, or merely an indemnity for loss suffered. If that is the issue on which the protection against double jeopardy turns, those who invoke the Constitution, as do the respondents here, ought to be allowed to prove that, as a matter of fact, the forfeiture and the double damages are punitive because they exceed any amount that could reasonably be regarded as the equivalent of compensation for the Government's loss. That in civil actions punitive damages are, as a matter of due process, sometimes allowed, see *Shevlin-Carpenter Co.* v. *Minnesota*, 218 U. S. 57, 69-70, or that there may be distinct penal and remedial provisions for the same wrong, see *O'Sullivan* v. *Felix*, 233 U. S. 318, 325, does not help solve our present problem, which arises when a second separate proceeding against the same persons for the same misconduct results in a plea based upon the double jeopardy clause. We must also put to one side the doctrine of *res judicata*. This is largely a judicial doctrine, though partly reflected in the Full Faith and Credit Clause, Article IV, § 1, and is aimed at avoiding the waste and vexation of relitigating issues already decided between the same parties. The doctrine of double jeopardy has a different history. It is part of the protection of the Constitution against pressures and penalties that offend civilized notions of justice.

and United States v. La Franca, 282 U.S. 568.

In my view the proper approach to the problem of double jeopardy in a situation like this, where Congress has imposed two sanctions for misconduct, however one may label them, and has provided for their enforcement in two separate proceedings, is that which was taken by Judge (later Mr. Justice) Blatchford in *In re Leszynsky*, 16 Blatchf. 9. The short of it is that where two such proceedings merely carry out the remedies which Congress has prescribed in advance for a wrong, they do not twice put a man in jeopardy for the same offense. Congress thereby merely allows the comprehensive penalties which it has imposed to be enforced in separate suits instead of in a single proceeding. By doing this Congress does not impose more than a single punishment. And the double jeopardy clause does not prevent Congress from prescribing such a procedure for the vindication of punitive remedies.

This view commends itself to reason. It is confirmed by history. For legislation of this character, providing two sanctions for the same misconduct, enforceable in separate proceedings, one a conventional criminal prosecution, and the other a forfeiture proceeding or a civil action as upon a debt, was quite common when the Fifth Amendment was framed by Congress. See, *e. g.*, the materials referred to in *In re Leszynsky, supra*, at 16-19. Like other specific provisions of the Constitution, the double jeopardy clause must be read in the context of its times. It would do violence to proper regard for the framers of the Fifth Amendment to assume that they contemporaneously enacted and continued to enact legislation that was offensive to the guarantees of the double jeopardy clause which they had proposed for ratification.

If it be suggested that a succession of separate trials for the enforcement of a great number of criminal sanctions, even though set forth in advance in a single statute, might be a form of cruelty or oppression, the answer is that the Constitution itself has guarded against such an attempt "to wear the accused out by a multitude of cases with accumulated trials", see *Palko* v. *Connecticut*, 302 U. S. 319, 328, by prohibiting "cruel and unusual punishments". Amendment VIII. But short of that which would offend the Eighth Amendment, statutes prescribing cumulative remedies have been commonplaces in the history of federal legislation. The Sherman Law, for example, allows four means of redressing a single offense—criminal prosecution, injunction, seizure of goods, and treble damages. If a *qui tam* action like the one

now before us were to be provided by Congress as a further deterrent against violation of the Sherman Law, it would certainly be commonly regarded as an additional punishment. But the double jeopardy clause would nevertheless not come into play.

It is for these reasons that I think the plea of double jeopardy in this case cannot be sustained.

SUPREME COURT OF THE UNITED STATES.

No. 173.—October Term, 1942.

United States of America *ex rel.* Morris L. Marcus and Morris L. Marcus in His Own Behalf, Petitioners,
vs.
William F. Hess et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January 18, 1943.]

Mr. Justice Jackson, dissenting.

I am constrained to dissent from the second division of the opinion and from the conclusion it supports.

I cannot deny that on a literal reading the statute says what the Court's opinion renders it to say. That being the case, one cannot be critical of those who stay close to the words of the statute because guiding principles as to where to depart and in what direction to depart and how far to depart from the literal words of a statute are so conflicting.

But that we have in these matters considerable, although ill-defined, freedom is certain. I could not better state my attitude toward the present statute as applied to this case than in the language of the present Chief Justice in *United States* v. *Katz*, 271 U. S. 354, 357:

"All laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose."

Nor was he announcing unorthodox or unconventional doctrine: In *American Tobacco Company* v. *Werckmeister*, 207 U. S. 284, 293, Mr. Justice Day said:

"But in construing a statute we are not always confined to a literal reading, and may consider its object and purpose, the things with which it is dealing, and the condition of affairs which led to its enactment so as to effectuate rather than destroy the spirit and force of the law which the legislature intended to enact.

"It is true, and the plaintiff in error cites authorities to the proposition, that where the words of an act are clear and unam-

biguous they will control. But while seeking to gain the legislative intent primarily from the language used we must remember the objects and purposes sought to be attained."[1]

If ever we are justified in reading a statute, not narrowly as through a keyhole, but in the broad light of the evils it aimed at and the good it hoped for, it is here. The only disadvantage therefrom falls on one who sues, not to be made whole for injuries he has sustained, or to recover for goods he has delivered, or services he has performed, but solely to make profitable to himself the wrong done by others. We should, of course, fully sustain informers in proceedings where Congress has utilized their self-interest as an aid to law enforcement. Informers who disclose law violations even for the worst of motives play an important part in making many laws effective. But there is nothing in the text or history of this statute which indicates to me that Congress intended to enrich a mere busybody who copies a Government's indictment as his own complaint and who brings to light no frauds not already disclosed and no injury to the Treasury not already in process of vindication.

In this case the Government investigated respondents and on November 3, 1939, indicted them for conspiracy to defraud. On January 5 and February 6, 1940, the defendants named in the indictment entered pleas of *nolo contendere*, and fines were imposed. While the criminal case was still pending, and on January 25, 1940, petitioner commenced his informer proceeding, the averments in his complaint being substantially a copy of the indictment. It is not shown that he had any original information, that he had added anything by investigations of his own, or that his recovery is based on any fact not disclosed by the Government itself. In the companion case the Government indicted and pleas of *nolo contendere* were entered on January 15, 1940, and two weeks thereafter Ostrager filed his complaint alleging facts substantially identical with those in the indictment, some of the paragraphs being almost verbatim copies. We are informed that these cases have already stimulated a number of other private individuals to intervene with similar action after Government criminal proceedings had disclosed frauds.

I am sure it was never in the mind of Congress to authorize this misuse of the statute. If ever there was a case where the letter

[1] See, also, Ozawa *v.* United States, 260 U. S. 178, 194; Helvering *v.* New York Trust Co., 292 U. S. 455, 464-5; United States *v.* Cooper Corp., 312 U. S. 600.

killeth but the spirit giveth life, it is this. Construed to the letter as the Court does, it becomes an instrument of abuse and corruption which can only be stopped by the timely intervention of Congress. If it were construed according to its spirit to reward those who disclose frauds otherwise concealed or who prosecute frauds otherwise unpunished, it would serve a useful purpose in the enforcement of the law and protection of the Treasury.

Since 1863 this law has been upon the statute books. Never until now has the bar dreamed that it permitted such use. When once it was attempted to commence an informer action under a similar statute after the Government had brought a civil action, this Court promptly limited the statute to preclude that sort of abuse. *Francis* v. *United States*, 5 Wall. 338. There was no specific language in the statute to support that court-made limitation, and although I find no specific language in this statute to support another, I should now say that the same limitation exists where the Government has already possessed itself of the facts and disclosed them in criminal proceedings. This is what I think the profession has generally assumed this statute to mean. If the statute has all these eighty years authorized this sort of proceeding, the legal profession of the United States has been strangely unresponsive to a Congressional proffer of windfall income.

We are justified in determining whether we will accept a new interpretation not before sustained in the history of this statute by reference to the condition of our own times rather than to those of former ones. Nothing better illustrates the difference between the conditions of 1863 and the present than the statement quoted by the Court, made by the Senate sponsor of the Informer Act, "Even the district attorney, who is required to be vigilant in the prosecution of such cases, may be also the informer, and entitle himself to one half the forfeiture under the qui tam clause, and to one half of the double damages which may be recovered against the persons committing the act." I do not understand the Court to hold that a prosecuting attorney may now sue, but in construing the statute as applied to the plaintiff now before us we must not forget that the Senator was then speaking of law-enforcement in a nation which had not yet established a Federal Department of Justice, which did not then have a Federal Bureau of Investigation, or a Treasury investigating force, and in which the activities of the Federal Government were so circumscribed that they had not been found necessary. To accept the view of

1863 to mean that today law-enforcement officials could use information gleaned in their investigations to sue as informers for their own profit, would make the law a downright vicious and corrupting one. Fortunately no one in the executive department has ever suspected that such an interpretation as the Court now indulges could be placed upon this statute. If we were to add motives of personal avarice to other prompters of official zeal the time might come when the scandals of law-enforcement would exceed the scandals of its violation.

But even as to non-officials, to permit the informer to recover when he has not actually informed seems to me an evil result unintended by the Act. The Court's interpretation means that the Government cannot institute a criminal action that is not subject to seizure of some interloper who thereby wrests control of its course from the Government itself. As lawyers not without experience in the practicalities of law-enforcement, we know that the trial of a criminal case can be wrecked by pre-trial of the issues on the civil side of the court, particularly if the civil trial is conducted by those not interested in the criminal prosecution. By trial, by taking of depositions, by other devices, the informer may force the premature disclosure of the Government's case, and it is certain that by collusion between one who acts as an informer and the party guilty of fraud the latter could obtain a disclosure of the case against him. We know, too, that the chance of conviction may well be prejudiced if the defendant may go before the jury and point to pending proceedings in which adequate reparations will be made. Every person prosecuted for crime, as a part of the strategy of defeating conviction, wants civil actions brought against him, and oftentimes wants to confess them or settle them in order to plead that he has squared his accounts with the law.

Moreover, we know that the assets of men engaged in criminal activities are rarely equal to the discharge of their obligations and in that event by sharing the available assets with an informer, the Government's financial recovery is diminished.

Also it has been found necessary to vest in someone the power to compromise claims of the Government, either where they are of doubtful collectibility or where the claim itself is of questionable validity. What becomes of the Attorney General's control over litigation in this respect if an informer may be admitted to share in the control of the case and may act in collusion with the guilty

party? May he no longer make a compromise of a case that will withstand subsequent attack by an informer?

It must be borne in mind that this is not a case where we are adhering to a construction of a statute which has been continuously applied over its long life. In such event I should not unlikely join with my colleagues. This, however, is the case of a new construction upon an eighty-year-old statute, one so farfetched that no member of the bar has ever before ventured to offer it in any reported case.[2] I would hold that the rich rewards of this kind of proceeding are reserved for those who actually and in good faith have contributed something to the enforcement of the law and the protection of the United States.

---

[2] Cf. United States v. Cooper Corp., 312 U. S. 600, 613-614.